Supreme Court No. 83768-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JANE ROE,

Appellant,

v.

TELETECH CUSTOMER CARE MANAGEMENT (COLORADO) LLC,

Respondent.

RESPONDENT'S ANSWER TO *AMICUS CURIAE* MEMORANDUM OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

STATE STATUTES

RULES

CONSTITUTIONAL PROVISIONS

I. INTRODUCTION

Respondent TeleTech Customer Care Management (Colorado), LLC ("TeleTech") submits the following answer to the *amicus curiae* memorandum submitted by the American Civil Liberties Union of Washington ("ACLU") in support of Petitioner Jane Roe's petition for review. Roe was terminated from employment with TeleTech after she tested positive for marijuana. At the time, Roe used marijuana more than four times a day as treatment for migraines, allegedly in accordance with Washington's Medical Use of Marijuana Act, RCW 69.51A ("MUMA"). The ACLU argues that Roe's termination was in violation of public policy and therefore supports Roe's petition for Supreme Court review. The ACLU fails to raise a single issue that suggests that the Court of Appeals erred in upholding the summary judgment dismissal of Roe's public policy claim. Because the Court of Appeals clearly reached the correct result, the petition for review should be denied.

II. ARGUMENT

Washington employees are generally terminable at will. *See Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 935, 913 P.2d 377 (1996). Wrongful discharge in violation of public policy is a narrow exception to the terminable-at-will doctrine. *See id.* at 935-36; *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984). To

prevail on a public policy claim, a plaintiff must prove: (1) the existence of a clear mandate of public policy (the clarity element); (2) that discouraging the conduct in which the plaintiff engaged would jeopardize the public policy (the jeopardy element); (3) that the public-policy-linked conduct caused the dismissal (the causation element); and (4) that the defendant does not have an overriding justification for dismissal (the absence of justification element). *See, e.g., Roberts v. Dudley*, 140 Wn.2d 58, 64-65, 993 P.2d 901 (2000). Here, Roe's public policy claim was properly dismissed, as three of those four elements are not met.

A. The ACLU Has Not Identified the Existence of a Clear Mandate of Public Policy

The ACLU contends that there is a public policy in Washington recognizing the right to "medical self-determination" (although nowhere does it define that right). The Court should not even consider the ACLU's proposed public policy, as it was never raised by Roe herself at any point in this litigation. In any event, no such policy exists.

1. The ACLU should not be permitted to reframe Roe's public policy claim

During the course of this litigation, Roe characterized her claimed public policy in at least three different ways. In her Amended Complaint, Roe claimed that MUMA contains a clear public policy "authorizing the

legal at-home use of medical marijuana for debilitating illnesses without adverse repercussions to the patient." CP 3 (at ¶ 5.2). In her opposition to TeleTech's Motion for Summary Judgment, Roe claimed that MUMA "establishes a clear statement of public policy forbidding employers from discharging employees solely based on their at-home use of medical marijuana." CP 467-68 (emphasis omitted). On appeal below, she argued that MUMA states a public policy that "'the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based on his or her physician's professional judgment and discretion.'" Appellant's Opening Brief at 27-28 (quoting RCW 69.51A.005) (filed on June 16, 2008).

The ACLU, however, argues that the public policy which Roe's termination purportedly violated was the right of "medical self-determination." *See Amicus Curiae* Memorandum of the ACLU ("ACLU Memo.") at 5. The ACLU, as *amicus*, should not be permitted to change the nature of Roe's public policy claim at this late date. Appellate courts ordinarily do not consider arguments raised only by *amicus curiae*. *See Washington State Bar Ass'n v. Great Western Union Fed. Sav. & Loan Ass'n*, 91 Wn.2d 48, 59, 586 P.2d 870 (1978); *see also Building Indus. Ass'n. of Wash. v. McCarthy*, --- Wn.2d ---, 218 P.3d 196, 210 n.12

(2009); *State v. Chamberlin*, 161 Wn.2d 30, 37 n.3, 16 P.3d 389 (2007) (declining to reach the issue raised by the ACLU in its *amicus* brief because it was not raised by the parties). Moreover, RAP 9.12 states that "[o]n review of an order granting or denying a motion for summary judgment the appellate court will consider *only* evidence and issues called to the attention of the trial court." RAP 9.12 (emphasis added). Roe did not argue to the trial court or to the Court of Appeals that the public policy on which she relied was the right of "medical self-determination." The ACLU should not be permitted to raise issues that were never presented by the parties.

2. There is no clear mandate of public policy recognizing the right to "medical self-determination"

In any event, there is no clear mandate of public policy in Washington protecting the right to "medical self-determination." The plaintiff bears the burden of proving that her dismissal violates a clear mandate of public policy. *See Sedlacek v. Hillis*, 145 Wn.2d 379, 393, 36 P.3d 1014 (2001). To determine whether a clear public policy exists, the Court must ask "whether the policy is demonstrated in a constitutional, statutory, or regulatory provision or scheme." *Danny v. Laidlaw Transit Serv., Inc.*, 165 Wn.2d 200, 207-08, 193 P.3d 128 (2008) (internal quotations omitted). Because the public policy exception is narrow,

courts have been advised to "*proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.*" *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984) (emphasis in original; citation omitted). The public policy for which a court must search "is an authoritative public declaration of the nature of the wrong." *Roberts*, 140 Wn.2d at 63.

The ACLU relies on four sources for its claimed public policy of the right to medical self-determination: the U.S. Constitution, RCW 7.70.030(3), RCW 70.245, and RCW 69.51A.005. None of these sources is an authoritative public declaration of the public policy framed by the ACLU.

- The Constitution: The ACLU first argues that the U.S. Supreme Court has recognized a constitutional interest "'in independence in making certain kinds of important decisions." ACLU Memo. at 5 (*quoting Whalen v. Roe*, 429 U.S. 589, 599-600, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977)). The constitutional right to privacy, as described in *Whalen*, cannot serve as the basis for a clear mandate of the broad right to "medical self-determination." In *Whalen*, physicians and patients challenged the constitutionality of New York statutes which required that the state be provided with a copy of every prescription for certain drugs. They

argued—unsuccessfully—that the statutes violated their constitutional rights to privacy, one of which is the privacy interest in independence in making certain kinds of important decisions. *See Whalen*, 429 U.S. at 599-600. The Court characterized the scope of that right, as recognized by prior Court decisions, as "'matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Id.* at 600, n.26. None of those interests apply here.[1] Neither the U.S. Constitution nor the *Whalen* decision contains a mandate of public policy in favor of the right to "medical self-determination." Indeed, even the ACLU admits that the constitutional interest at issue in *Whalen* is "not clearly defined." ACLU Memo. at 5.

- RCW 7.70.030. The ACLU argues that Washington has codified medical self-determination as a public policy in RCW 7.70.030. That statute permits a plaintiff to bring a medical malpractice claim in situations where the patient did not content to treatment. *See* RCW 7.70.030(3). There is *no* clear mandate of public policy found in the

[1] The *Whalen* Court also noted that simply because some individuals might be discouraged from using a certain medication if information is made available to the state, it could not be said that "any individual has been *deprived* of the right to decide independently, with the advice of his physician, to acquire and to use needed medication." *See id.* at 602-03 (emphasis added). For that same rationale, even if this Court accepts the ACLU's public policy (which it should not), Roe cannot meet the jeopardy element. *See* Section II.B, *infra*.

statute that espouses a broad right to "medical self-determination."

- RCW 70.245. RCW 70.245 is the Washington Death with Dignity Act. It allows terminally ill patients, who meet other listed requirements, to make a written request for medication that the patient may self-administer to end his or her life, and allows physicians to prescribe such medications in accordance with the Act's requirements. See RCW 70.245.020, .040. RCW 70.245 does not contain a clear mandate of public policy espousing a broad right to "medical self-determination." Indeed, the statute suggests the exact opposite, as the vast majority of Washingtonians do not have a right to be prescribed life-ending medications.

- MUMA. Finally, the ACLU, like Roe, relies on MUMA as a source of its claimed public policy. The ACLU claims that MUMA "*explicitly confirms* that public policy favoring medical self-determination applies equally to qualifying patients." ACLU Memo. at 6 (emphasis added). MUMA does no such thing.[2] Moreover, MUMA cannot be the

[2] The ACLU relies on RCW 69.51A.005, which states, inter alia: "The people find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion." Notably, this preamble is grammatically nonsensical, as it discusses the "decision to *authorize*" the medical use of marijuana, not the decision to *use* medical marijuana. As a technical matter, therefore, it does not address patients' rights at all.

sole source for a wrongful termination in violation of public policy claim because MUMA expressly disclaims any such intent. The version that was in effect at the time of Roe's termination stated: "*Nothing in this chapter requires any accommodation of any medical use of marijuana in any place of employment* . . ." RCW 69.51A.060(4). This provision in MUMA distinguishes this case from *Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000).

Moreover, this is not an appropriate case for a wrongful termination claim at all. "Washington courts have generally recognized the public policy exception when an employer terminates an employee as a result of his or her (1) refusal to commit an illegal act, (2) performance of a public duty or obligation, (3) exercise of a legal right or privilege, or (4) in retaliation for reporting employer misconduct." *Gardner*, 128 Wn.2d at 935-36. None of those four situations apply here. Roe did not have a legal right or privilege to consume marijuana because marijuana (medical or otherwise) remains illegal under federal law.

B. Roe's Termination Did Not Jeopardize the ACLU's Claimed Public Policy

Even if there were a clear mandate of public policy in favor of the right to medical self-determination (which there is not), Roe's termination did not jeopardize that public policy. The ACLU argues that TeleTech's

anti-drug policy constituted "an impermissible insertion of the employer into the doctor-patient relationship in contravention of clear public policy favoring medical self-determination." ACLU Memo. at 8. Policies such as TeleTech's, however, would not impact the doctor-patient relationship in any way. There is no evidence that they would change a doctor's decision to authorize medical marijuana, nor do they deprive patients of the right to decide independently whether to use marijuana. While such policies might be a factor in the patient's decision, it cannot be the case that any outside influence on a patient's medical decisions is impermissible as a matter of public policy. If that were true, then medical care would have be free of charge, since one of the greatest impediments to medical treatment is cost. Moreover, under the ACLU's theory, employers in Washington would have an obligation to accommodate any medical decision made by their employees, including purely cosmetic procedures. That would be a clearly absurd result.

C. TeleTech Has an Overriding Justification for Refusing to Employ Current Users of Illegal Drugs

Finally, the ACLU tries to diminish TeleTech's legitimate and justified desire for a drug-free workplace by arguing that state governments prosecute more marijuana cases than the federal government. Even if true, marijuana is illegal under federal law. The legitimate and

justifiable reasons for TeleTech's desire for a drug free workplace, set forth at pages 44-46 of the Brief of Respondent (filed on or about August 27, 2008) are not diminished just because federal drug prosecutions are less common. Finally, the policy memorandum issued by the Department of Justice on October 19, 2009 cannot be the basis for finding that TeleTech was not justified in following its drug policy because that memorandum did not exist when Roe was terminated in 2006.

III. CONCLUSION

For all of the foregoing reasons, TeleTech respectfully requests that the Petition for Review be denied.

DATED: January 15, 2010.

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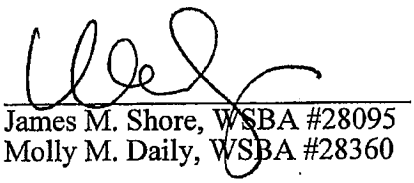

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